UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W–02–735 OF 2006, W–02–653 OF 2006 AND W–01–79 OF 2006
JAMES FOONG, LOW HOP BING AND SURIYADI JJCA
26 JULY 2007

Public Authorities — Tort — Breach of statutory duty — Failure to maintain road — Road closure adversely affected plaintiff's business — Whether local authority immune from liability arising from breach of statutory duty

Tort — Breach of statutory duty — Failure to maintain road — Road closure adversely affected plaintiff's business — Whether amounted to breach of statutory duty — Whether breach caused injury to plaintiff — Whether TOL granted allowed defendants to disregard rights of road users and bring about public nuisance or breaches of statutory duties — Street, Drainage and Building Act 1974 ss 12 & 46(3)(a)

Tort — Damages — Nuisance — Calculation of damages — Estimated loss of business — Whether average past profits should be based on profit after or before tax — Whether economic recession and emergence of competitions were valid considerations — Loss of business in any event considered

Tort — Nuisance — Public nuisance — Road closure adversely affected plaintiff's business — Whether special damage over and above that suffered by members of the public generally proved — Government Proceedings Act 1956 s 8(1)

The first defendant/appellant was UDA Holdings, a statutory body, while the second defendant was DBKL and the third defendant was the Government of Malaysia. At the commencement of this action in 1997 the plaintiff ('the respondent') was running a supermarket business ('the supermarket') at the ground floor of a 19 storey building at No 69, Jalan Haji Hussein, Kuala Lumpur ('the premises'). The respondent had started its business at this premises sometime in 1975. The main entrance to the supermarket was at Lorong Haji Hussein 3 where 35 car parking bays were located. This side road was a thoroughfare and proved to be very convenient to the customers of the respondent's supermarket for purposes of loading and unloading passengers and goods to their vehicles. Sometime towards the end of October 1996 the second defendant acting in concert with the first and the third defendants caused the Lorong Haji Hussein 3 ('the road') to be closed to all traffic. It began with the first defendant declaring and categorizing that part of the road adjacent to the respondent's supermarket as a Temporary Occupational Licence (TOL) after an application by the second defendant who also closed the road to all traffic.

A Subsequently the first defendant constructed 76 stalls at the road. The closure of the road was supposedly for a period of two years. But it turned out that it was only reopen to public after a period of five years. It was closed from 28 October 1996 to 30 November 2001. Due to the road closure the respondent's supermarket business suffered tremendously. Despite experiencing substantial losses in the business caused by the closure of the road, the respondent continued to operate the supermarket at the premises until September 2001. Then on first of December 2003, the respondent was forced to sell the premises for a sum of RM6m but with a right to rent it back for a period of five years at a monthly rental of RM60,676. An option to renew this tenancy for a further term of five years at a rental based on prevailing market value was also accorded to the respondent by the new owner. About 2 ½ years after they shut down the supermarket, the respondent re-opened it in February 2004.

There were two causes of action relied on by the respondent to mount this claim: (1) against UDA Holdings, DBKL and the Government of Malaysia for public nuisance; and (2) against DBKL and the Government of Malaysia for breach of statutory duty.

The respondent claimed that they suffered, inter alia, the following losses: (1) estimated loss of business between November 1996 till September 2003: RM9,844,157; (2) difference between the market value of the premises and the sale price: RM1,078,000; (3) rental of the premises (after sale) for the initial period of five years: RM3,640,560; (4) rental of the premises (after sale) for the optional period of another five years: RM2,370,000; and (5) loss of goodwill: RM 1,811,000; (6) loss of business in any event: RM5,000,000. The defendants' witnesses DW2 and DW8 challenged the respondent's claim of RM3,640,560 for rental to the premises for the initial period of five years after the premises was sold as the rental for the premises was part of the operating cost. The learned trial judge however allowed all these claims after holding that they were proven.

The defendants appealed. It was submitted that the respondent had not established public nuisance as this tort requires proof that the alleged nuisance had not only affected the supermarket but also the public or a class of members of the public. All the three defendants submitted in substantially similar vein that the learned trial judge had erroneously concluded that the collapse of the supermarket's business was entirely due to the closure of the affected portion of the road and the erection of the 76 stalls on it, adding that there were other causes such as economic recession, stiff and unfair competition from hypermarkets, increased operating costs of the supermarket's branches in Kulim and Kangar and the unsatisfactory customer service rendered by the supermarket's members of the staff. It was contended that DBKL's liability for the supermarket's claim for pure economic loss based on the tort of public nuisance is excluded by the judgment of the Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 6 MLJ 389 ('MPAJ'). In response, it was argued for the supermarket that its claim against DBKL was grounded not merely on public nuisance, but also breaches of statutory duties.

Held, unanimously dismissing the appeals against liability and by majority dismissing the appeals against quantum:

(1) (per **Low Hop Bing JCA**, **Suriyadi JCA** concurring; **James Foong JCA** dissenting on quantum only) Public nuisance collectively caused by the three

defendants is actionable at the instance of the supermarket whose right of suit is independent of s 8(1) of the Government Proceedings Act 1956. The concerted acts of the three defendants had inflicted on the supermarket special damage not merely in degree but also different in kind in the exercise or enjoyment of its rights and convenience. Such special damage is over and above that suffered by members of the public generally as users of the road and customers of the supermarket. In the circumstances, the supermarket had succeeded in proving public nuisance on a balance of probabilities against all the three defendants (see para 75).

(2) (per **Low Hop Bing JCA**, **Suriyadi JCA** concurring; **James Foong JCA** dissenting on quantum only) DBKL's omission to perform its duty to maintain the road as a public street under s 12(1) of the Street, Drainage and Building Act 1974 and its failure to exercise the powers under s 46(3)(a) to remove the obstruction were obvious manifestations of DBKL's non-fulfilment of its statutory duties. DBKL's breaches of statutory duties had caused injury to the respondent as reflected in the eventual collapse of the business of the supermarket (see paras 87–88).

(3) (per **Low Hop Bing JCA**, **Suriyadi JCA** concurring; **James Foong JCA** dissenting on quantum only) In the exercise of the land administrator's powers in the issuance of the TOL to enable DBKL to barricade the road and to facilitate the erection of the 76 stalls by UDA, DBKL and the land administrator as an officer of the Government of Malaysia had effectively disregarded the rights of the users of the road generally and the supermarket specially. The TOL does not and could not clothe the three defendants with a carte blanche, licence or defence to cause, create or bring about public nuisance or breaches of statutory duties (see para 93).

(4) (per **Low Hop Bing JCA**, **Suriyadi JCA** concurring; **James Foong JCA** dissenting on quantum only) The supermarket's business depended wholly and exclusively on the customers who were used to parking their cars at the parking bays on the road for the purpose of loading and unloading foodstuff and household goods purchased from the supermarket. The closure of the affected portion of the road and the erection of the 76 stalls had put a halt to the flow of traffic and customers to the supermarket. The lifeline of the supermarket's business appeared to have been disconnected, not for two years as originally contemplated by the defendants, but for the inordinate period of five years. The tremendous adverse effect on the supermarket's business was plain and obvious (see para 99).

(5) (per **Low Hop Bing JCA**, **Suriyadi JCA** concurring; **James Foong JCA** dissenting on quantum only) DBKL may rely on the majority judgment of the MPAJ's case to exclude liability from the supermarket's claim for pure economic loss based on negligence and nuisance only. The majority judgment however does not provide DBKL with an insulation or immunization against its liability arising from breaches of statutory duties (see para 108).

(6) (per **Low Hop Bing JCA**, **Suriyadi JCA** concurring; **James Foong JCA** dissenting on quantum only) The learned trial judge had accepted the evidence of the relevant witnesses for the plaintiff. These witnesses including the actuary

had been bombarded by way of incisive cross-examination. The learned trial judge had found that the evidence of the actuary in particular and that of the other witnesses who testified for the plaintiff in general had emerged unscathed. The court was unable to find any error in the award of the damages by the learned trial judge. There was no justification for appellate interference, except to observe that since UDA, DBKL and the Government of Malaysia were joint tortfeasors, in public nuisance and additionally, DBKL for breaches of statutory duties, their liability should be apportioned equally (see para 132).

(7) (per **James Foong JCA** dissenting on quantum) Though the MPAJ's case is based on the cause of action for negligence, it is by analogy should also extend to a cause of action for public nuisance. However, since UDA is not a public body, the protection offered to DBKL would not apply to UDA. UDA was therefore liable to the respondent for public nuisance (see para 6).

(8) (per **James Foong JCA** dissenting on quantum) In respect of breach of statutory duty, aside from DBKL, the Government of Malaysia was also liable to the respondent. This was caused by the act of the Land Administrator, Kuala Lumpur, a servant and/or agent of the latter, in issuing the TOL to a public road and for the purpose of erecting the stalls thereon. This is contrary to the National Land Code and the road Transport Act 1987. In addition, breach of statutory duty was also committed by a servant and/or agent of the Government of Malaysia in the person of the Secretary General of the Ministry of Local Government & Housing who approved the construction of the stalls and issued a certificate of inspection for them after they were constructed. On this cause of action for breach of statutory duty, public policy did not exempt either DBKL or the Government of Malaysia from a claim based on pure economic loss. These two bodies were therefore liable to the respondent for breach of statutory duty (see para 7).

(9) (per **James Foong JCA** dissenting on quantum) With regards to the calculation of estimated loss of business between November 1996 till September 2003, profit after tax and not profit before tax should be used. Adjustment must be made to the average past profit which is used as a standard for calculation of the respondent's future business loss (see para 8). Also, a write off of RM992,245 for fixed assets of the respondent's Kulim and Kangar supermarket branches found in the respondent's account for year 2000 and a loss caused by the sale of Amanah Saham in Perwira Affin Bank amounting to RM609,504 which was included in the respondent's 2001 account had no relationship with the closure of the road. These amounts should be deducted in calculating future business loss of the respondent since they were not associated with the closure of the road (see para 16).

(10) (per **James Foong JCA** dissenting on quantum) The learned trial judge had found that the respondent's supermarket business was immune to economic recession as the commodities sold in the supermarket were essential consumer goods. Proof of this was the profits gained by the supermarket during the 1984 economic downturn. The court was inclined to agree with this observation and found that this contributing factor had little significant effect on the business of the supermarket at then time (see para 16).

(11) (per **James Foong JCA** dissenting on quantum) As the emergence of hypermarkets had contributed to the losses, 25% ought to be deducted from RM7,018,404.20. This would give a balance of RM5,263,804. This would be a fair amount of compensation to the respondent for the loss of business due to the closure of the road (see para 22).

(12) (per **James Foong JCA** dissenting on quantum) If not for the prolonged closure of the road causing severe loss to the supermarket there was no necessity for the respondent to dispose off the property. As the sale of the premises was a direct consequence of the closure of the road, then this item of loss suffered by the respondent must be paid by the parties who caused it. The sum of RM1,078,000 was a fair estimate for this category of loss suffered by the respondent (see para 23).

(13) (per **James Foong JCA** dissenting on quantum) When rental had been accounted as an item in the operating cost and the amount claimed for the loss of business amount was allowed based on such account then claiming payment of rental separately once again would be making a claim for the same item twice. This was because rental for the premises had been duly considered when compensating the respondent for the loss of the business (see para 26).

(14) (per **James Foong JCA** dissenting on quantum) Unlike the claim for the loss of goodwill, which was well supported by expert's calculations based on established formula, this substantial sum of RM5,000,000 for loss of business in any event seems to be plucked out of the air. Without cogent evidence to convince the court as to how this amount was arrived at, such claim ought to be dismissed (see para 37).

[Bahasa Malaysia summary

Defendan pertama/perayu adalah UDA Holdings, sebuah badan berkanun, manakala defendan kedua adalah DBKL dan defendan ketiga adalah Kerajaan Malaysia. Apabila tindakan ini dimulakan dalam tahun 1997 plaintif ('responden') menjalankan perniagaan pasaraya ('pasaraya') di tingkat bawah sebuah bangunan 19 tingkat di No 69, Jalan Haji Hussein, Kuala Lumpur ('premis'). Responden telah memulakan perniagaannya di premis tersebut sekitar tahun 1975. Jalan masuk utama pasaraya tersebut adalah di Lorong Haji Hussein 3 di mana 35 tempat letak kereta disediakan. Sebelah jalan ini adalah jalan besar dan terbukti mudah untuk pelanggan pasaraya responden bagi tujuan menaik dan menurunkan penumpang dan barangan ke kenderaan mereka. Di penghujung bulan Oktober 1996 defendan kedua yang bertindak bagi pihak defendan-defendan pertama dan ketiga menyebabkan Lorong Haji Hussein 3 ('jalan tersebut') ditutup kepada lalu lintas. Ia bermula dengan defendan pertama mengisytiharkan dan mengkategorikan bahawa bahagian jalan bertentangan pasaraya responden sebagai Temporary Occupational Licence (TOL) selepas satu permohonan oleh defendan kedua yang juga telah menutup jalan kepada semua lalu lintas. Berikutan itu defendan pertama telah membina 76 buah gerai di jalan tersebut. Penutupan jalan tersebut dikatakan hanya untuk tempoh dua tahun. Namun ia hanya dibuka semula kepada awam selepas tempoh lima tahun. Ia telah ditutup daripada 28 Oktober 1996 hingga 30 November 2001. Akibat penutupan jalan tersebut pasaraya responden terjejas teruk. Meskipun

A mengalami kerugian banyak dalam perniagaan yang disebabkan oleh penutupan jalan tersebut, responden terus mengendalikan pasaraya di premis tersebut sehingga September 2001. Kemudian pada 1 Disember 2003, responden dipaksa menjual premis tersebut untuk jumlah RM6m tetapi mempunyai hak untuk menyewanya balik untuk tempoh lima tahun pada kadar sewa bulanan sejumlah RM60,676. Pilihan untuk memperbaharui penyewaan ini untuk tempoh selanjutnya selama lima tahun pada kadar sewa yang berdasarkan nilai pasaran semasa juga diberikan kepada responden oleh tuanpunya baru. Selepas 2½ tahun mereka menutup pasaraya tersebut, responden telah membuka semulanya dalam bulan Februari 2004.

Terdapat dua kausa tindakan yang digunakan oleh responden untuk memulakan tuntutan ini: (1) terhadap UDA Holdings, DBKL dan Kerajaan Malaysia untuk kacau ganggu awam; dan (2) terhadap DBKL dan Kerajaan Malaysia untuk pelanggaran tanggungjawab statutori.

Responden mendakwa bahawa mereka telah mengalami, antara lain, kerugian berikut: (1) anggaran kerugian perniagaan antara bulan November 1996 hingga September 2003: RM9,844,157; (2) perbezaan antara nilai pasaran premis tersebut dan harga jualan: RM1,078,000; (3) sewa premis tersebut (selepas jualan) untuk tempoh pertama lima tahun: RM3,640,560; (4) sewa premis tersebut (selepas jualan) untuk tempoh pilihan untuk lima tahun lagi: RM2,370,000; dan (5) kehilangan nama baik: RM1,811,000; (6) kerugian perniagaan dalam apa keadaan: RM5,000,000. Saksi-saksi defendan-defendan DW2 dan DW8 mencabar tuntutan responden berjumlah RM3,640,560 untuk sewa premis tersebut bagi tempoh pertama lima tahun tersebut setelah premis itu dijual kerana sewa premis itu adalah sebahagian daripada kos pengendalian. Hakim perbicaraan yang bijaksana bagaimanapun telah membenarkan kesemua tuntutan tersebut setelah memutuskan semuanya telah dibuktikan.

Defendan-defendan telah merayu. Ia dihujahkan bahawa responden tidak membuktikan kacau ganggu awam kerana tort ini memerlukan bukti bahawa kacau ganggu yang dikatakan itu bukan sahaja menjejaskan pasaraya tersebut tetapi juga orang awam atau suatu kelas ahli masyarakat awam. Ketiga-tiga defendan telah berhujah berhubung unsur sama bahawa hakim perbicaraan yang bijaksana telah terkhilaf apabila memutuskan bahawa keruntuhan perniagaan pasaraya tersebut adalah pada keseluruhannya disebabkan penutupan bahagian yang terjejas jalan itu dan 76 buah gerai yang dibina, ditambah pula terdapat sebab lain seperti kemerosotan ekonomi, saingan sengit dan tidak adil daripada pasaraya besar lain, kos pengendalian yang meningkat di cawangan pasaraya itu di Kulim dan Kangar dan khidmat pelanggan yang tidak memuaskan yang diberikan oleh pekerja-pekerja pasaraya tersebut. Adalah ditegaskan bahawa liabiliti DBKL untuk tuntutan pasaraya tersebut untuk kerugian ekonomi tulen berdasarkan tort kacau ganggu awam adalah dikecualikan oleh penghakiman Mahkamah Persekutuan dalam *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 6 MLJ 389 ('MPAJ'). Sebagai maklumbalas, adalah dihujahkan untuk pasaraya tersebut bahawa tuntutannya terhadap DBKL bukan hanya berdasarkan kacau ganggu awam, tetapi juga pelanggaran-pelanggaran tanggungjawab statutori.

Diputuskan, sebulat suara menolak rayuan-rayuan terhadap liabiliti dan secara majoriti menolak rayuan-rayuan terhadap kuantum:

(1) (oleh **Low Hop Bing HMR**, **Suriyadi HMR** bersetuju; **James Foong HMR**

menentang berhubung kuantum sahaja) Kacau ganggu awam secara kolektif yang disebabkan oleh ketiga-tiga defendan boleh didakwa dalam hal pasaraya tersebut mempunyai hak guaman tidak bergantung kepada s 8(1) Akta Prosiding Kerajaan 1956. Tindakan ketiga-tiga defendan telah menyebabkan pasaraya mengalami kerugian khas bukan hanya setakat tahap tetapi juga jenis berbeza dalam penggunaan atau nikmat hak dan kemudahannya. Kerugian khas begini melampaui apa yang dialami oleh masyarakat awam secara umum sebagai pengguna jalan dan pelanggan-pelanggan pasaraya itu. Dalam keadaan sedemikian, pasaraya tersebut telah berjaya membuktikan kacau ganggu awam atas imbangan kebarangkalian terhadap ketiga-tiga defendan (lihat perenggan 75).

(2) (oleh **Low Hop Bing HMR**, **Suriyadi HMR** bersetuju; **James Foong HMR** menentang berhubung kuantum sahaja) Kegagalan DBKL untuk melaksanakan tanggungjawabnya untuk menyelenggarakan jalan sebagai jalan awam di bawah s 12(1) Akta Jalan, Parit dan Bangunan 1974 dan kegagalannya untuk menggunakan kuasa di bawah s 46(3)(a) untuk mengalih halangan dengan jelas menunjukkan ketidakpatuhan tanggungjawab statutori DBKL. Pelanggaran tanggungjawab statutori DBKL telah menyebabkan kecederaan kepada responden sebagaimana yang digambarkan dalam keruntuhan perniagaan pasaraya itu akhirnya (lihat perenggan 87–88)

(3) (oleh **Low Hop Bing HMR**, **Suriyadi HMR** bersetuju; **James Foong HMR** menentang berhubung kuantum sahaja) Dalam penggunaan kuasa pentadbir tanah dalam pengeluaran TOL untuk membolehkan DBKL membuat sekatan jalan dan untuk membolehkan pembinaan 76 gerai oleh UDA, DBKL dan pentadbir tanah sebagai pegawai Kerajaan Malaysia secara berkesan telah tidak menghiraukan hak-hak pengguna jalan secara amnya dan pasaraya itu khususnya. TOL tidak boleh melindungi ketiga-tiga defendan dengan suatu carte blanche, lesen atau pembelaan kepada kausa, membentuk atau memulakan kacau ganggu awam atau pelanggaran tanggungjawab statutori (lihat perenggan 93).

(4) (oleh **Low Hop Bing HMR**, **Suriyadi HMR** bersetuju; **James Foong HMR** menentang berhubung kuantum sahaja) Perniagaan pasaraya bergantung secara keseluruhan dan eksklusif kepada pelanggan telah biasa meletakkan kereta di tempat letak kereta di jalan tersebut bagi tujuan menaik dan menurunkan barang makanan dan barangan rumah yang dibeli daripada pasaraya tersebut. Penutupan kepada bahagian jalan yang terlibat itu dan pembinaan 76 gerai tersebut telah menghalang laluan lalu lintas dan pelanggan-pelanggan ke pasaraya tersebut. Tali hayat perniagaan pasaraya tersebut telah diputuskan bukan untuk dua tahun seperti yang dijangkakan oleh defendan-defendan pada asalnya, tetapi untuk tempoh lima tahun yang keterlaluan. Kesan buruk ke atas perniagaan pasaraya tersebut adalah nyata dan jelas (lihat perenggan 99).

(5) (oleh **Low Hop Bing HMR**, **Suriyadi HMR** bersetuju; **James Foong HMR** menentang berhubung kuantum sahaja) DBKL boleh bergantung kepada penghakiman majoriti kes MPAJ untuk mengecualikan liabiliti daripada tuntutan pasaraya itu untuk kerugian ekonomi tulen berdasarkan kecuaian dan kacau ganggu sahaja. Penghakiman majoriti bagaimanapun tidak memberikan

DBKL penebatan atau kekebalan terhadap liabiliti yang timbul daripada pelanggaran tanggungjawab statutori (lihat perenggan 108).

(6) (oleh **Low Hop Bing HMR**, **Suriyadi HMR** bersetuju; **James Foong HMR** menentang berhubung kuantum sahaja) Hakim perbicaraan yang bijaksana telah menerima keterangan relevan saksi-saksi plaintif. Saksi-saksi tersebut termasuklah aktuari telah dihujani persoalan melalui satu pemeriksaan balas yang terperinci. Hakim perbicaraan yang bijaksana mendapati keterangan aktuari khususnya dan saksi-saksi lain yang memberi keterangan untuk plaintif secara amnya kelihatan tidak tercemar. Mahkamah tidak dapat menemui apa-apa kesilapan dalam award ganti rugi oleh hakim perbicaraan yang bijaksana. Tiada justifikasi untuk campur tangan pihak rayuan, kecuali untuk meneliti memandangkan UDA< DBKL dan Kerajaan Malaysia merupakan pesalah tort bersama, dalam kacau ganggu awam dan tambahan pula, DBKL untuk pelanggaran tanggungjawab statutori, liabiliti mereka hendaklah dibahagikan secara sama rata (lihat perenggan 132).

(7) (oleh **James Foong HMR** menentang berhubung kuantum) Meskipun kes MPAJ adalah berdasarkan kausa tindakan untuk kecuaian, secara analogi ia patut juga suatu kausa tindakan untuk kacau ganggu awam. Namun, memandakan UDA bukan satu badan awam, perlindungan yang ditawarkan kepada DBKL tidak terpakai kepada UDA. UDA oleh demikian bertanggungjawab kepada responden kerana kacau ganggu awam (lihat perenggan 6).

(8) (oleh **James Foong HMR** menentang berhubung kuantum) Berhubung pelanggaran tanggungjawab statutori, selain daripada DBKL, Kerajaan Malaysia juga bertanggungjawab kepada responden. Ini disebabkan oleh tindakan Pentadbir Tanah, Kuala Lumpur, pekerja dan/atau ejennya, yang telah mengeluarkan TOL untuk suatu jalan awam dan bagi tujuan menaikkan gerai-gerai di situ. Ini adalah bertentangan dengan Kanun Tanah Negara dan Akta Jalan Raya 1987. Tambahan pula, pelanggaran tanggungjawab statutori juga telah dilakukan oleh pekerja dan/atau ejen Kerajaan Malaysia melalui Ketua Sekretariat Kementerian Kerajaan Tempatan dan Perumahan yang telah meluluskan pembinaan gerai-gerai tersebut dan mengeluarkan satu sijil pemeriksaan untuk gerai-gerai tersebut setelah didirikan. Berhubung kausa tindakan ini untuk pelanggaran tanggungjawab statutori, polisi awam tidak mengecualikan sama ada DBKL atau Kerajaan Malaysia daripada satu tuntutan berdasarkan kerugian ekonomi tulen. Kedua-dua badan tersebut adalah bertanggungjawab kepada responden kerana pelanggaran tanggungjawab statutori (lihat perenggan 7).

(9) (oleh **James Foong HMR** menentang berhubung kuantum) Berhubung pengiraan anggaran kerugian perniagaan antara November 1996 hingga September 2003, keuntungan selepas cukai dan bukan keuntungan sebelum cukai patut digunakan. Penyelarasan hendaklah dibuat ke atas keuntungan purata sebelumnya yang digunakan sebagai piawai pengiraan untuk kerugian masa hadapan perniagaan responden (lihat perenggan 8). Juga, hapus kira sejumlah RM992,245 untuk aset-aset tetap cawangan-cawangan pasaraya responden di Kulim dan Kangar yang didapati dalam akaun tahun 2000 responden dan kerugian yang disebabkan oleh jualan Amanah Saham

di Perwira Affin Bank sejumlah RM609,504 yang termasuk dalam akaun 2001 responden tiada kaitan dengan penutupan jalan tersebut. Jumlah-jumlah tersebut patut dipotong dalam mengira kerugian perniagaan masa hadapan responden memandangkan ia tiada kaitan dengan penutupan jalan tersebut (lihat perenggan 16).

(10) (oleh **James Foong HMR** menentang berhubung kuantum) Hakim perbicaraan yang bijaksana mendapati bahawa perniagaan pasaraya responden tidak terjejas akibat kemerosotan ekonomi kerana komoditi yang dijual dalam pasaraya tersebut adalah barangan pelanggan yang penting. Bukti ini adalah keuntungan yang diperoleh oleh pasaraya tersebut semasa kemelesetan ekonomi tahun 1984. Mahkamah lebih bersetuju dengan penelitian ini dan mendapati bahawa faktor penyumbang ini tiada kesan yang mendalam ke atas perniagaan pasaraya tersebut pada masa itu (lihat perenggan 16).

(11) (oleh **James Foong HMR** menentang berhubung kuantum) Dengan kewujudan pasaraya besar lain telah menyumbang kepada kerugian tersebut, 25% patut dipotong daripada RM7,018,404.20. Ini akan memberikan baki RM5,263,804. Ini adalah jumlah pampasan yang adil kepada responden untuk kerugian perniagaan akibat penutupan jalan tersebut (lihat perenggan 22).

(12) (oleh **James Foong HMR** menentang berhubung kuantum) Jika bukan disebabkan penutupan jalan berpanjangan yang mengakibatkan kerugian teruk ke atas pasaraya tersebut tiada keperluan untuk responden menjual hartanah itu. Oleh kerana jualan premis itu adalah akibat langsung penutupan jalan itu, maka item ini untuk kerugian yang dialami oleh responden hendaklah dibayar oleh pihak-pihak yang menyebabkannya. Jumlah RM1,078,000 adalah anggaran adil untuk kategori ini untuk kerugian yang dialami oleh responden (lihat perenggan 23).

(13) (oleh **James Foong HMR** menentang berhubung kuantum) Apabila sewa dianggap sebagai satu item dalam mengendalikan kos dan jumlah yang dituntut untuk jumlah kerugian perniagaan dibenarkan berdasarkan ini maka menuntut bayaran sewa premis sekali lagi seperti membuat tuntutan untuk item sama. Ini adalah kerana sewa untuk premis hanya dipertimbangkan apabila memberi pampasan kepada responden untuk kerugian perniagaan (lihat perenggan 26).

(14) (oleh **James Foong HMR** menentang berhubung kuantum) Tidak seperti tuntutan untuk kehilangan nama baik, yang disokong oleh pengiraan pakar berdasarkan formula yang tetap, jumlah sebanyak RM5,000,000 untuk kerugian perniagaan dalam apa keadaan dianggap seperti direka-reka. Tanpa bukti yang meyakinkan untuk meyakinkan mahkamah tentang bagaimana jumlah ini diperoleh, tuntutan sebegini patut ditolak (lihat perenggan 37).]

Notes

For a case on breach of statutory duty, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1783.

For cases on failure to maintain road generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 22–55.

For cases on nuisance, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 230–235.
For cases on public nuisance, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1576–1578.

Cases referred to

Attorney-General (on the relation of Glamorgan County Council and Portardawe Rural District Council) v PYA Quarries LTD [1957] 1 All ER 894 (refd)
Cutler v Wandsworth Stadium Ltd [1949] AC 398 (refd)
David v Abdul Cader [1963] WLR 834 (refd)
EON Bank Bhd v Flamingo And Another Case [2005] 1 MLJ 712 (refd)
Great Central Railway Co v Hewlett [1916] 2 AC 511 (refd)
Hu Sepang v Keong On Eng & Ors [1991] 1 MLJ 440 (refd)
International Times & ORS v Leong Ho Yuen [1980] 2 MLJ 86 (refd)
Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 6 MLJ 389 (refd)
Parimala a/p Muthusamy v Projek Lebuhraya Utara-Selatan [1997] 5 MLJ 488 (refd)
Schacht v The Queen in Right of the Province of Ontario (1972) 30 DLR (3d) 641 (refd)
Syarikat Perniagaan United Aces Sdn Bhd & ORS v Majlis Perbandaran Petaling Jaya [1997] 1 MLJ. 394 (refd)
Takong Tabari v Government of Sarawak & Ors [1996] 5 MLJ. 435 (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ. 697 (refd)
Tenaga Nasional BHD v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673 (refd)
Vasiliou v Secretary of State for Transport & Anor [1991] 2 All ER 77 (refd)

Legislation referred to

Civil Law Act 1956 s 3
Evidence Act 1950 s 101
Government Proceedings Act 1956 s 8(1), (2)
National Land Code ss 42(2), 65, 66
Street, Drainage and Building Act 1974 ss 12, 46(1)(a), (3)(a)

Appeal from: Civil Appeal Nos S2–21–152 of 1997, S2–21–153 of 1997 (High Court, Kuala Lumpur)

Zainur Zakaria (Zulkifli Nordin with him) (Zulkifli Nordin & Associates) for the appellant in Civil Appeal No W–02–735 of 2006.
A Kanesalingam (V Jeya Kumar and K Shanmuga with him) (Kanesalingam & Co) for the respondent in Civil Appeal No W–02–735 of 2006.
Romesh Abraham (T Sudhar with him) (Shook Lin & Bok) for the appellant in Civil Appeal No W–02–653 of 2006.
A Kanesalingam (V Jeya Kumar and K Shanmuga with him) (Kanesalingam & Co) for the respondent in Civil Appeal No W–02–653 of 2006.
Narkunavathy Sundareson (Senior Federal Counsel) for the appellant in Civil Appeal No W–01–79 of 2006.
A Kanesalingam (V Jeya Kumar and K Shanmuga with him) (Kanesalingam & Co) for the respondent in Civil Appeal No W–01–79 of 2006.

James Foong JCA:

INTRODUCTION

[1] There are three related appeals before us and they were heard together because they involved the same subject matter. For ease of reference, I shall refer to the appellant in appeal case no W–02–735–2006 as UDA Holdings, in appeal case no W–02–653–2006 as DBKL and in appeal case no W–01–79–2006 as Government of Malaysia. After deliberation, we are of the unanimous opinion that the decision of the court below should be upheld in respect of liability. However we differ on the issue of quantum where Low Hop Bing and Suriyadi JJCA, by majority, agreed with the finding of the learned trial judge whilst I am of the view that it should be reduced. But before I proceed to give my reasons, it is necessary for me to reproduce the facts of this case with emphasis on certain dates and events which are pertinent to the issue of quantum.

FACTS

[2] As to the basic facts of this case, I could not have put it more comprehensively than the learned trial judge in the following passages which I reproduce below. Reference made by the learned trial judge to the first defendant is UDA Holdings, second defendant is DBKL and the third defendant is the Government of Malaysia.

> At the commencement of this action in 1997 the Plaintiff was running a supermarket business (the said supermarket) at the ground floor of a 19 storey building at No 69, Jalan Haji Hussein, Kuala Lumpur (the said premises). The Plaintiff had started its business at this premises sometime in 1975. The Plaintiff being a cooperative society, enjoyed getting customers mainly from its members consisting of about 6000 individual members and 50 cooperative societies eg Police Cooperative Society, the Armed forces Cooperative Society and Wilayah Persekutuan Government Servants Cooperative Society. The products sold at the supermarket were mainly food stuff and essential household goods. The main entrance to the supermarket was at Lorong Haji Hussein 3 where 35 car parking bays were located. This side road is a thoroughfare and proved to be very convenient to the customers of the plaintiff's supermarket for purposes of loading and unloading passengers and goods to their vehicles ….
>
> Sometime towards the end of October 1996 the second defendant acting in concert with the first and the third defendants caused the Lorong Haji Hussein 3 (the said road) to be closed to all traffic. It began with the first defendant declaring and categorizing that part of Lorong Haji Hussein 3 adjacent to the Plaintiff's supermarket as a Temporary Occupational Licence (TOL) after an application by the second defendant who also closed the road to all traffic. Subsequently the first defendant constructed 76 stalls at Lorong Haji Hussein 3.
>
> The purpose of the actions taken by the defendants was as follows. The first defendant, who at the relevant time known as Urban Development Authority (UDA), a statutory body, intended to construct two multi-storey building on Lot 2347, situated not far from the plaintiff's supermarket on the same Jalan Haji Hussein. It so happened that during that time UDA's land was occupied by unlicensed hawkers. To commence development on the said land UDA had to remove the unlicensed hawkers first. To do that UDA sought the assistance of Dewan Bandaraya Kuala Lumpur (DBKL), the second defendant in this suit, to have the said hawkers removed from UDA's land. However it was also necessary for the

second defendant to locate a new place for the said hawkers. It was decided that the place would be Lorong Haji Hussein 3 that part of public road adjacent to the entrance to the plaintiff's supermarket. To do that the approval of the Land Administrator for Wilayah Persekutuan Kuala Lumpur, the third defendant, to have the Lorong Haji Hussein 3 converted from a public road to a TOL had to be obtained. An application to that effect was made by both the first and second defendants. The third defendant granted the application. Once that part of Lorong Haji Hussein 3 was converted into a TOL the second defendant closed the road to all traffic and the first defendant constructed 76 stalls with a view to relocate the said hawkers here from UDA's land. Although keys to 36 stalls had been collected it would appear that only 12 stalls were occupied by the said hawkers. Be that as it may, its effect on the plaintiff's supermarket business had been very adverse. The number of customers coming to the plaintiff's supermarket began to dwindle. The main reason was due to access problem by cars and difficulty of parking. The road had been barricaded by the second defendant. The car parking bays had been abolished. That area had been congested with so many people, a completely different situation as that before it was closed.

The closure of the road was supposedly for a period of two years. But it turned out that it was only reopen to public after a period of five years. It was closed from 28 October 1996 to 30 November 2001. Due to the road closure the plaintiff's supermarket business suffered tremendously. It had to resort to the selling of the building and renting it back from the purchaser in the hope that it would be able to sustain the losses within the period of two years during the road closure. But the plaintiff was unable to sustain the loss any further as the road closure had continued well beyond the two year period. It therefore had to close its business.

[3] Despite experiencing substantial losses in the business caused by the closure of the said road, the respondent continued to operate the said supermarket at the said premises until September 2001. Then on 1 December 2003, the respondent was forced to sell the said premises for a sum of RM6m but with a right to rent it back for a period of five years at a monthly rental of RM60,676. An option to renew this tenancy for a further term of five years at a rental based on prevailing market value was also accorded to the respondent by the new owner. About 2½ years after they shut down the said supermarket, the respondent re-opened it in February 2004.

[4] Since it is necessary to bear in mind certain particular dates in this episode, I have highlighted them in chronological order:

20 October 1996: closure of Lorong Haji Hussein 3;

September 2001: the respondent closed the said supermarket;

November 2001: Lorong Haji Hussein 3 was re-opened;

1 December 2003: the respondent sold the said premises;

February 2004: the respondent re-opened the said supermarket at the said premises.

CAUSES OF ACTION

[5] There are two causes of action relied on by the respondent to mount this claim. The first is against UDA Holdings, DBKL and the Government of Malaysia for public nuisance. The second is against DBKL and the Government of Malaysia for breach of statutory duty.

[6] Based on the same reasons enunciated by Low Hop Bing JCA in his grounds of judgment (which I had the advantage of reading in draft) I agree that UDA Holdings, DBKL and the Government of Malaysia are liable under the cause of action for public nuisance. But as correctly pointed by Low Hop Bing JCA, public policy demands that DBKL to be exempted from liability for pure economic loss. This is expounded in the Federal Court decision of *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 6 MLJ 389. Though this case is based on the cause of action for negligence, it is my view that by analogy it should also extend to a cause of action for public nuisance. However, since UDA Holdings is not a public body, the protection offered to DBKL does not apply to UDA Holdings. UDA Holdings is therefore liable to the respondent for public nuisance.

[7] In respect of breach of statutory duty, I am of the view that aside from DBKL, the Government of Malaysia is also liable to the respondent. This was caused by the act of the Land Administrator, Kuala Lumpur, a servant and/or agent of the latter, in issuing the TOL to a public road (Lorong Haji Hussein 3) and for the purpose of erecting the stalls thereon. This is contrary to the National Land Code and road Transport Act 1987. In addition, breach of statutory duty was also committed by a servant and/or agent of the Government of Malaysia in the person of the Secretary General of the Ministry of Local Government & Housing who approved the construction of the stalls and issued a certificate of inspection for them after they were constructed. On this cause of action for breach of statutory duty, I do not believe that public policy exempts either DBKL or the Government of Malaysia from a claim based on pure economic loss. These two bodies are therefore liable to the respondent for breach of statutory duty.

RESPONDENT'S PECUNIARY CLAIMS

[8] As the result of the actions of UDA Holdings, DBKL and the Government of Malaysia, the respondent claimed that they suffered the following losses:

(i) estimated loss of business between November 1996 till September 2003: RM9,844,157;

(ii) difference between the market value of the said premises and the sale price: RM1,078,000;

(iii) rental of the said premises (after sale) for the initial period of five years: RM3,640,560;

(iv) rental of the said premises (after sale) for the optional period of another five years: RM2,370,000;

(v) loss of goodwill: RM1,811,000;

(vi) loss of business in any event: RM5,000,000;

(vii) interest at 8% per annum on judgment sum from date of filing to date of realization;

(viii) costs.

[9] The learned trial judge allowed all these claims after holding that they were proven followed by a remark that the defence did not call any witness, let alone expert witness, to rebut the quantum of damages suffered by the plaintiff.

[10] This remark is obviously a mistake in the face of the appeal record where it disclosed that the Defence called no less than two experts, one of whom is the Chair Professor of Business Administration with the University of Malaya (DW2), and the other a chartered accountant (DW8) with extensive experience in accounting practices to challenge the formulation and calculation of the amount claimed by the respondent.

[11] As each of the respondent's claims requires different treatment, I shall deal with them in turn. However before I do so, it is necessary to remind myself of the principle regarding the award damages suffered as a result of an interference with an ongoing business concern. It is '*to award damages so as to put the claimant, as far as money can do, in the position he would have been in had the tort or breach of contract never occurred*' — see para 4–001 *McGregor on Damages* (17th Ed).

RM9,844,157: LOSS OF BUSINESS

[12] The amount of RM9,844,157 estimated by the respondent for loss of business is derived in this manner. The respondent took the average past profit of the said supermarket for 6 years prior to the closure of the said road. This was from 1991 to 1996. The amount comes up to RM382,228.90 calculated in the manner shown below:

1991 profit RM694,513

1992 profit RM349,558.81

1993 profit RM334/706.16

1994 profit RM583,928.65

1995 profit (RM46,707.21)

1996 profit RM377,374

[13] Total RM2,293.373.41 divided by 6 years = RM382,228.90

[14] The respondent then add this average past profit to the losses they suffered from September 1997 (year ending after the said road was closed) to September 2003 (just before they re-opened the said supermarket). The details of which are:

(i) September 1997 annual loss RM693,281 + average past profit of RM382.228.90 = RM1,075,504.

(ii) September 1998 annual loss RM686,614 + average past profit of RM382,228.90 = RM 1,068,842.

(iii) September 1999 annual loss RM351,577 + average past profit of RM382,228.90 = RM733,805.

(iv) September 2000 annual loss RM2,165,858 + average past profit RM382,228.90 = RM2,548,086.

(v) September 2001 annual loss RM1,658,492 + average past profit RM382,228.90 = RM2,040,720.

(vi) September 2002 annual loss RM994,448 + average past profit RM382,228.90 = RM1,376,676

(vii) September 2003 annual loss RM618,296+ average past profit RM382,228.90 = RM1,000,524.

[15] Total loss RM9,844,157.

[16] However, according to DW2 and DW8, this method of calculation is flawed in many ways. I shall deal with each of them in turn.

1 DW8 felt that average past profit for the six years is taken before tax. According to him the profit for each of the years under consideration should be pre-taxed since taxation charged ought to be included as a business expense in the income statement. This is in accordance with 'inancial Reporting Standard 112, Income Tax'. Therefore the average past profit should be reduced by deducting taxes levied on the profits of each of the six years taken for calculation of the average past profit.

PW4, the actuary who was the principal proponent of this respondent's claim agreed to this when he said 'I agree that I should use profit after tax and not profit before tax' (p 526 Vol 2 Appeal Record). With this admission from the respondent, adjustment must be made to the average past profit which is used as a standard for calculation of the respondent's future business loss. I shall undertake to do so later when all necessary deductions are considered.

2 The next discrepancy raised by DW8 is that there are two items not related to the closure of the said road but included in the respondent's loss account for 2000 and 2001. They are:

(a) A write off of RM992,245 for fixed assets of the respondent's Kulim and Kangar supermarket branches found in the respondent's account for year 2000. This has nothing to do with the closure of the said road.

(b) A loss caused by the sale of Amanah Saham in Perwira Affin Bank amounting to RM609,504. This was included in the respondent's 2001 account. Again this has no relationship with the closure of the said road.

On item (b) above, PW4 has admitted (at p 526 Vol 2 of Appeal Record) 'that the road closure had nothing to do with the price of the unit trust'.

With these disclosures and the admission, I agree that the amount highlighted above should be deducted in calculating future business loss of the respondent since they are not associated with the closure of the said road.

3. Both DW2 and DW8 next claimed that the respondent's business losses were not caused solely by the closure of the said road. They insisted that

there were other equally important contributing factors. They could be summarized as: (a) The Asean economic recession in 1997 that severely affected the general spending power of Malaysian consumers at the material time; (b) Competition from hypermarkets in and around Kuala Lumpur; (c) The decline of the respondent's membership; (d) The uncertainty of the country's economy. I shall deal with each of these in turn.

3(a) On the first contributing factor, the learned trial judge had found that the respondent's supermarket business was immune to such an economic recession as the commodities sold in the said supermarket were essential consumer goods. Proof of this was the profits gained by the said supermarket during the 1984 economic downturn.

I am inclined to agree with this observation and find that this contributing factor had little significant effect on the business of the said supermarket at then time under consideration.

3(b) However on the second contributing factor, even the respondent themselves had admitted both orally and in their annual reports that the emergence and invasion hypermarkets had contributed to their losses. With these admissions, I feel that appropriate deduction ought to be made on the amount claimed by the respondent.

3(c) The third contributing factor concerns the decrease in the patronage of the respondent's own members at the said supermarket. The respondent's statistics found in p 463 of Vol 1 of Appeal Record has confirmed this decline. According to DW2, this could be due to the changing life style, values and taste of the respondent's members as well as to the new business format adopted by the respondent's competitors. But I am of the view that though this may be correct to a certain extent but nevertheless patronage of the said supermarket was not solely reliant on the respondent's own members. After all, the said supermarket was situated in a commercial area where the general public had access and this would have countered the shortfall caused by the respondent's members. Further, I am of the view that such decline in members" patronage could have been arrested or remedied if the respondent were accorded an opportunity to do so if not for the closure of the said road. Taking all these into consideration, I find this contributing factor insignificant to the calculation of the respondent's future business loss.

3(d) Both DW4 and DW8 had pointed out that the respondent's estimate did not give due consideration to the uncertainty in the country's economy. They felt that since the country's economy fluctuates, future losses should take this into account. This may be a factor but then the respondent's trade as explained earlier was immune to adverse economic conditions affecting the country. This factor, though significant in most other business, is less relevant in this case.

3(e) DW8 has charged the respondent's experts for adopting an over-simplistic and unrealistic approach in calculating future business loss. He then elaborated his own formula.

[17] I have studied the alternative method provided by DW8. It is not the only acceptable method for calculating future business loss. It is just an alternative. The respondent's approach is no less inferior. Where the respondent's methodology includes the consideration of all relevant and applicable factors and elements then I failed to see why it should not be less preferred to the method proffered by DW8. To me, it is a reasonable method of calculation and there is no reason why it should not be accepted.

[18] Now that I have considered all the issues raised, I shall proceed to calculate the estimated loss by taking into consideration the necessary deductions discussed above.

[19] Average past profit after tax should be calculated as follows:

1991 profit after tax is RM451.433.45 (RM694,513 — RM243.079.55 (@ 35% taxable rate in 1991)

1992 profit after tax is RM227,213.23 (RM349,558.81 — RM122,345.58 (@ 35% taxable rate in 1992)

1993 profit after tax is RM217,559.01 (RM334,706.16 — RM117,147.15 (@ 34% taxable rate in 1993)

1994 profit after tax is RM397,071.49 (RM583,928.65 — RM186,857.16 (@ 32% taxable rate in 1994)

1995 profit after tax is nil since there is a net loss of (RM46,707.21).

1996 profit after tax is RM264,162 (RM377,374 — RM113,212 (@ 30% taxable rate in 1996)

Therefore the average past profit after tax should be: RM1,244,217.60 divide by 6 years = RM207,369.60

[20] This average past profit after tax is then added to the losses:

where in September 1997 the annual loss was RM693,281 (+ average profit RM207,369.60) = RM900,650.60;

where in September 1998 the annual loss was RM686,614 (+ RM207.369.60) = RM893,983.60;

where in September 1999 the annual loss was RM351,577 (+ RM207,369.60) = RM558.946.60;

where in September 2000 the annual loss was RM2,165,858 but since a sum of RM992,245 was a write off of fixed assets of the Kulim and Kangar branches unconnected with the road closure, it has to be deducted. The actual loss was therefore RM1,173,613 (RM2,165,858 – RM992,245) (+ RM207,369.60) = RM1,380,982.60;

where in September 2001 the annual loss was RM1,048,988 (deducting from the original stated loss of RM1,658,492 a sum of RM609,504 which is unconnected loss suffered from the sale of Amanah Sahara in Perwira Affin Bank) + RM207,369.60 = RM1,256,357.60;

where in September 2002 the annual loss was RM994,448 (+ RM207,369.60) = RM1,201,817.60;

where in September 2003 the annual loss was RM618,296 (+ RM207,369.60) = RM825,665,60.

[21] Total losses from September 1997 to September 2003 is RM7,018,404.20

[22] As the emergence of hypermarkets had contributed to the losses, I am of the view that 25% ought to be deducted from RM7,018,404.20. This gives a balance of RM5,263,804. This, I consider to be a fan-amount of compensation to the respondent for the loss of business due to the closure of the said road.

RM1,078,000: DIFFERENCE BETWEEN MARKET PRICE AND SALE PRICE OF THE SAID PREMISES

[23] The respondent has claimed that since they sold the said premises measuring 20,225 sq ft below market value, they should be compensated a sum of RM1,078,000 which is the difference between the forced sale price of RM6m and the estimated market value of RM7,078,000. I agree with the learned trial judge's finding that if not for the prolonged closure of the said road causing severe loss to the said supermarket there was no necessity for the respondent to dispose off this property. As the sale of the said premises was a direct consequence of the closure of the said road, then this item of loss suffered by the respondent must be paid by the parties who caused it. I find this sum of RM1,078,000 a fair estimate for this category of loss suffered by the respondent.

RM3,640,560: RENTAL OF THE SAID PREMISES (AFTER ITS SALE) FOR THE INITIAL PERIOD OF FIVE YEARS

[24] DW2 and DW8 had challenged the respondent's claim of RM3,640,560 for rental to the said premises for the initial period of five years after the said premises was sold.

[25] They first said that rental for the said premises was part of the operating cost. Second, it was a management decision to re-open the said supermarket in the said premises. As such the respondent should be responsible for taking such risk. Third, there should be "future discounted returns on assets (either through use or rental)" since the consideration obtained from the sale of the said premises was realised up-front. Finally, the connection between this claim and the closure of the said road is too remote.

[26] I am much attracted to the first ground advanced in this challenge. I observed that in the all profit and loss accounts tendered by the respondent there was an item allocated to rental. This provision must be for the return on the respondent's own fixed asset ie the said premises which belonged to them. As this property was their own, such amount could be listed as rental in the respondent's operating cost for the running of the said supermarket. When rental has been accounted as an item in the

operating cost and the amount claimed for the loss of business amount was allowed based on such account then claiming payment of rental separately once again would, in my view, be making a claim for the same item twice. This is because rental for the said premises has been duly considered when compensating the respondent for the loss of the business.

[27] If I have erred in accepting that rental was provided for as operating expense for the running of the said supermarket, and that no provision was ever made by the respondent in the operating cost for rental income derived from their said premises, then the average profit which was used as a standard to add to each year of loss from September 1997 to September 2003 as well as the losses suffered by the respondent subsequent to the closure of the said road would be completely wrong. This is based on the basic proposition that if the said premises had been rented out, it would have fetched the respondent an income and this should be credited into the respondent's account.

[28] As I believed that rental for the return of the said premises had been provided as part of the operating cost of the said supermarket, the respondent should not be entitled to this claim for rental once again.

[29] On the second challenge that it was a management decision to re-open the said supermarket at the same premises, I am of the view that this was a commercial policy decision. However, this decision was taken as a direct result of the events that transpired ie the closure and the re-opening of the said road. As such the respondent should not be faulted for adopting such a decision which was, to me, a natural outcome.

[30] On the contention by DW8 that there should be a discount for the money obtained up-front resulting from the sale of the said premises, I am in agreement. However, as the claim under this category of loss should be dismissed for the reason as stated, I need not elaborate on this and on the claim that the connection between this and the closure of the said road is too remote.

RM2,370,000: RENTAL PAYABLE ON OPTION TO NEW THE TENANCY TO THE SAID PREMISES

[31] The respondent has added to their claim a sum of RM2,370,000 for rental to be paid on the said premises for the extended period after the initial term of five years. This is based on the assumption that the respondent would continue with their business at the said premises by exercising their option to renew the tenancy. The amount of RM2,370,000 is arrived at in this manner:

> RM39,500.00 per month x 60 (based on the option right to renew for another 5 years) = RM2,370,000.

[32] First, I am at a loss as to how the base figure of RM39,500 per month is obtained. The tenancy agreement between the respondent and the new proprietor of the said premises specifies that rental for the optional period would be at "prevailing

market value". This, of course requires determination at a future date. So pegging the figure of RM39,500 per month rental for this extended period is unrealistic and not scientifically estimated. It lacks certainty. Further, it would also fail for the same reason as I have given for the claim for current rental. In addition, if I may add, it is too remote and over extended. If the said supermarket business does not improve and losses continue then there is no option for the respondent to continue operating in the said premises. They would have to move somewhere else or to close down this enterprise altogether. I do understand that the respondent is a body corporate and will exist in perpetuity but the issue here is not whether they will cease to continue with the objectives laid down in their constitution, it is whether they must persist in the same location where they experience perpetual loss.

RM1,811,000.00: LOSS OF GOODWILL

[33] The respondent has claimed a sum of RM1,811,000, calculated by PW 4, for loss of goodwill for the said supermarket. PW4 defined goodwill as 'that a willing vendor will be prepared to accept at a price that a willing buyer will be prepared to pay in an arm's length transaction for the goodwill of the business that was carried out at that location'. This does not include tangible assets such as real property, stock-in-trade, furniture and fittings and equipment. The basis for this claim, according to PW2 (the respondent's accountant), is because there was a 'loss in the sale value of the business caused by disruption (due to the closure of the said road) and this is calculated actuarially'. DW8, on the other hand, termed goodwill as:

> Firstly, goodwill, as generally understood, represents the difference between the value of the business as a whole over the sum of its parts (ie the net assets of the business). In accounting standards, goodwill represents future economic benefits arising from assets that are not capable of being individually identified and separately recognized (see Financial Reporting Standard 3, Business Combinations). Goodwill of a business arises when there are unidentifiable but favourable attributes, such as customer loyalty, motivated workforce, good location, business connection, synergies, etc. These attributes enable a business to generate a return in excess of a normal return on the net assets employed, ie, there must be evidence of superior or above normal profit to support the existence of goodwill.

[34] I do not think that there is any material difference between these two interpretations except that the former is less technical than the latter. Both mean the same thing. However, what is pertinent here is whether there is goodwill in the first place and whether the respondent is entitled to it and if so, how much?

[35] It cannot be denied that prior to the closure of the said road, except for the year 1995, the said supermarket had consistently returned a profit to the respondent. This would attract goodwill for anyone interested to purchase the said supermarket at that time because of its profitable track record. But after the said road was closed, profits plummeted significantly into loss. By then potential buyers would not have parted a cent for the goodwill attached to the business. In this sense, I find that the respondent had indeed suffered a loss of goodwill and ought to be compensated. But at what price?

[36] On the estimate for loss of goodwill, DW8 questioned the methods and factors employed by PW4 in arriving at RM1,811,000. He felt that goodwill enjoyed by the respondent, if at all, should be zero. Having given due consideration to the views of both these experts, I conclude that the methodology employed by PW4 in coming up with his estimate is reasonable and well supported by acceptable principles. I see no reason why it should be rejected. Thus, the respondent should be entitled to this item of claim.

RM5,000,000: LOSS OF BUSINESS IN ANY EVENT

[37] The respondent's last item of claim is a sum of RM5,000,000 for loss of business in any event. They explained that this differs from the claim for loss of business as the respondent would need funds to promote the said supermarket business to what it was before the closure of the road. PW2 even went further to stress that this 'is a very moderate estimate' that includes the cost of promotions, advertisements and the like. Surprisingly, though the respondent had re-opened the said supermarket in February 2004, no evidence was advanced by the respondent to show the exact amount that was spent on promotions. I would have thought that that would be the most opportune time to attempt to reinstate the said supermarket business back to its former glory. Aside from the absence of such cogent evidence, there is also no disclosure as to how this amount of RM5,000,000 is arrived at. Unlike the claim for the loss of goodwill, which was well supported by expert's calculations based on established formula, this substantial sum of RM5,000,000 seems to be plucked out of the air. Without cogent evidence to convince the court as to how this amount is arrived at, such claim ought to be dismissed.

CONCLUSION

[38] In conclusion, based on my reasons aforesaid, I am of the view that only the following be allowed:

1. Loss of business: RM5,263,804
2. Loss suffered as a result of the

sale of the said premises: RM 1,078,000

3. Loss of goodwill: RM1,811,000.

Total: RM8,152,804.

There should also be interest of 8% per annum thereon from date of filing to date of realization.

This amount should be paid by UDA Holdings, DBKL and Government of Malaysia equally.

Accordingly, these appeals should be allowed in part to the amount as stated. There shall be half costs for these appeals to be paid by UDA Holdings, DBKL and Government of Malaysia respectively to the respondent. The deposits for these appeals to the respondent towards account of taxed costs. The order of the High Court varied in respect of damages to the sum of RM8,152,804 with interest thereon at 8% per annum from date of filing to date of realization and costs.

Low Hop Bing JCA:

APPEALS

[39] There are three related appeals viz:

Civil Appeal	Appellant
(1) W–02–735–2006	UDA Holdings Sdn Bhd. the first defendant in the High Court ('UDA')
(2) W–02–653–2006	Dato Bandar Kuala Lumpur, the second defendant in the High Court ('DBKL').
(3) W–01–79–2006	Government of Malaysia, the third defendant in the High Court

[40] The respondent is Koperasi Pasaraya Malaysia Bhd, the plaintiff in the High Court ('the supermarket').

[41] The appellants have appealed against the decision of the learned Kuala Lumpur High Court judge who had on 21 September 2006 allowed the supermarket's claim and awarded damages amounting to RM23,743,157 with interest at 8% p.a. and costs.

SUPERMARKET'S CAUSE OF ACTION

[42] In essence, the supermarket's cause of action as pleaded in the repeatedly amended statement of claim against UDA, DBKL and the Government of Malaysia is founded on public nuisance and breaches of statutory duties.

FACTUAL BACKGROUND

[43] First, the agreed facts.

[44] Commencing 1975, the supermarket has been operating for 21 years on its own premises at 69, Jalan Haji Hussein, which is near the Chow Kit wet market in central Kuala Lumpur. It had a direct entrance along Lorong Haji Hussein Tiga which is an open road ('the road') with 35 on-the-road parking bays on one side.

[45] Pursuant to the application by UDA and DBKL, the Kuala Lumpur Land Administrator ('the land administrator') an officer of the Government of Malaysia issued a Temporary Occupation Licence ('the TOL') to UDA in respect of the land in the middle of the road ('the affected portion of the road').

[46] On 29 October 1996, the direct entrance to the road from Jalan Haji Hussein was barricaded. After six months, a building comprising 76 stalls was constructed by UDA on the affected portion of the road to relocate unlicensed hawkers from

Lot 2347 which is the land owned by UDA ('UDA's land') in the Chow Kit market area. Once UDA had completed the construction of a multi-storey building on UDA's land, the 76 stalls would be demolished. They were indeed subsequently demolished and the road was opened five years after it was first barricaded.

[47] In September 1996, the supermarket recorded more than RM21m in sales per annum for the third successive year. Immediately after the affected portion of the road was closed to all vehicles, the supermarket experienced a sharp drop in its turnover. This drop in sales deteriorated drastically. The supermarket then sold its premises in order to realise cash to pay creditors. Meanwhile it negotiated for a lease with the purchaser for it to carry on its business on the same premises as a lessee. The supermarket finally closed down in 2003.

[48] Apart from the above agreed facts, after a protracted trial covering some 23 days, the learned trial judge also arrived at certain finding of facts which, where relevant to these appeals, may be unfolded later in this judgment, in addition to the following narrative.

[49] The supermarket enjoyed getting customers mainly from 6,000 individual members and 50 co-operative societies. The products sold at the supermarket were essentially foodstuff and household goods. It operated daily and has some 3500 customers from 8am to 10pm. It closed only for two days on Hari Raya Puasa and two other days in a year for stock-taking.

[50] Based on the nature of goods sold and the type of customers, the supermarket's business was not affected by recession or competition by the emergence of wholesale markets and hypermarkets prior to 1996.

[51] Towards the end of October 1996, DBKL acting in concert with UDA and the Government of Malaysia by way of the TOL caused the affected portion of the road to be closed to all traffic.

PRELIMINARY ORDERS

[52] Prior to the trial of this action, the learned judge made two preliminary orders viz.

1 that the TOL was validly issued; and

2 the supermarket's action was struck out for failure to comply with the requirements of proving special damage based on public nuisance under s 8 of the Government Proceedings Act 1956.

[53] The Court of Appeal subsequently allowed the supermarket's appeal, set aside both the preliminary orders and directed the learned judge to proceed with the full

hearing of the action, which was dutifully complied with. The learned judge stressed that he had made the two preliminary orders based purely on procedure as the full facts of the case were not before him.

[54] Before proceeding to the trial, the supermarket had in its final amended statement of claim sought damages only, as the 76 stalls had since been demolished.

VALIDITY OF THE TOL

[55] In the instant appeals, learned counsel En Zainur Zakaria submitted for UDA that the learned trial judge had erred in concluding that the TOL had been invalidly issued, as the land administrator has the power to issue the TOL under ss 65 and 66 read with s 42(2) of the National Land Code ('NLC').

[56] Learned counsel Mr Ramesh Abraham, assisted by Mr Sudharsaran Thillainathan, argued for DBKL that the supermarket had not sought any order to declare the TOL invalid but had limited its claim to damages only.

[57] Learned Senior Federal Counsel, Ms Narkunavathy Sundareson, submitted for the Government of Malaysia that the issuance of the TOL by the land administrator to UDA had complied with proper procedure.

[58] It was contended by Mr A Kanesalingam, the supermarket's learned counsel, that the validity of the TOL was res judicata in view of the decision of the Court of Appeal which had set aside the two preliminary orders of the learned trial judge. It is pertinent for me to note that the learned trial judge had after a full hearing of the action specifically found that the validity of the TOL was a non-issue. That being the case, his Lordship's view that the TOL had been invalidly issued was at best mere obiter dictum and not ratio decidendi. Hence, I do not feel the necessity to delve upon this non-issue any further.

PUBLIC NUISANCE

[59] UDA complained that the learned trial judge had erred in concluding that public nuisance had been proved when the barricade of the road had only made it less convenient to the shoppers.

[60] DBKL asserted that the supermarket has not established public nuisance as this tort requires proof that the alleged nuisance had not only affected the supermarket but also the public or a class of members of the public, relying on *Halsbury's Laws of Malaysia* Vol. 5 pp 265–266 para 80.262; *Takong Tabari v Government of Sarawak & Ors* [1996] 5 MLJ. 435 (HC); and *Attorney-General (on the relation of Glamorgan County Council and Portardawe Rural District Council) v PYA Quarries LTD* [1957] 1 All ER 894 (CA).

[61] The Government of Malaysia took the view that the TOL was only intended to facilitate the erection of 76 stalls, pending the construction of UDA's two multi-storey buildings on UDA's land, and that the learned trial judge had erred in holding that the Government of Malaysia had caused public nuisance to the supermarket.

[62] The supermarket responded that the learned trial judge had correctly considered and rejected the three appellants' reliance on the TOL as a defence.

[63] I would start with the burden of proof. As the supermarket is the party asking the court to give judgment as to the legal right or liability, dependent on the existence of facts which the supermarket asserts ie public nuisance, it bears the burden of proving the tort of public nuisance. In this regard, the supermarket must establish facts which constitute public nuisance: see s 101 of the Evidence Act 1950; *EON Bank Bhd v Flamingo And Another Case* [2005] 1 MLJ 712, p 721 (HC); *Tenaga Nasional BHD v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673 (HC); *International Times & ORS v Leong Ho Yuen* [1980] 2 MLJ 86 (FC); and *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ. 697 (HC).

[64] The term 'nuisance' covers a wide variety of tortious acts or omissions and may not be capable of any legal definition. Its definition will depend on the surrounding circumstances. An illustration of nuisance arises where a person's right of free passage or part thereof has been the subject of interference. He is endowed with the right to take up a nuisance action: per Suriyadi J (now JCA) in *Parimala a/p Muthusamy v Projek Lebuhraya Utara-Selatan* [1997] 5 MLJ 488, p 501G– I.

[65] By way of extension and elaboration, public nuisance is one which inflicts damage, injury or inconvenience on subjects of the State or on members of a class who come within the sphere or neighbourhood of its operation, although it may affect some members to a greater extent than others. The determination of whether the number of persons affected is sufficiently large so as to constitute a class for this purpose is one of fact: See *Halsbury's Laws of Malaysia* Vol 5 pp 265–266 para 80.262; *Takong Tabari* at p 458D per Richard Malanjum J (now CJ (Sabah & Sarawak)); and *PYA Quarries Ltd* at p 902D–F per Romer LJ.

[66] The public nuisance which the supermarket has to prove is that which affects the public or a class thereof generally and the supermarket specially. In this connection, an analysis of the facts is of immense importance.

[67] The road had provided the supermarket with a direct entrance and 35 parking bays. It was a thoroughfare and proved to be very convenient to the supermarket's customers in terms of loading and unloading passengers and goods to their vehicles.

[68] Towards the end of 1996, DBKL acting in concert with UDA and the Government of Malaysia caused the affected portion of the road to be closed to the public and indeed to all traffic, while UDA constructed the 76 stalls there.

[69] The cumulative and ultimate effect of the steps taken by UDA, DBKL and the Government of Malaysia was to enable UDA to develop and construct two multi-storey buildings on UDA's land situated not far from the supermarket.

[70] During that time, UDA's land was occupied by unlicensed hawkers. UDA had to remove these hawkers in order to commence development thereon. UDA had sought DBKL's assistance to have the hawkers removed from UDA's land. To this end, DBKL decided to relocate the hawkers to the affected portion of the road adjacent to the direct entrance of the supermarket. To do that, UDA and DBKL had applied for and obtained the TOL from the land administrator for the affected portion of the road. Thereafter, DBKL closed the road to all traffic, and UDA constructed the 76 stalls for the purpose of relocating the hawkers. Consequently, the supermarket's business was adversely affected. The number of customers coming to the supermarket began to dwindle, as the road had been barricaded, and parking bays wiped out. That area was so congested that it was completely different from the original thoroughfare prior to its closure.

[71] What was initiated by the three defendants as a two-year closure was stretched to more than five years, from 28 October 1996 to 30 November 2001. The adverse effect on the supermarket's business led to the sale of the premises by the supermarket to and renting it back from the owner subsequently. The supermarket had hoped that it could sustain the two-year closure, but that was not to be the case. The supermarket was unable to bear the loss any further in view of the five-year closure. That spelt the eventual collapse and demise of the supermarket's business.

[72] The concerted acts of the three defendants culminating in the closure of the affected portion of the road in a busy commercial area for more than five years had clearly inflicted damage, injury or inconvenience on the subjects of the State viz the users of the road as well as members of a class viz the customers of the supermarket generally and the supermarket specially. Such acts certainly constitute public nuisance.

[73] Generally, under s 8(1) of the Government Proceedings Act 1956, public nuisance is actionable at the instance of:

1 the Attorney-General; or

2 a relator action, by two or more persons having obtained the consent in writing of the Attorney-General, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case, though no damage has been caused.

[74] However, s 8(2) of the same Act states that nothing in s 8 shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

[75] In my judgment, on the above analysis of facts, the public nuisance collectively caused by the three defendants herein is actionable at the instance of the supermarket whose right of suit is independent of s 8(1). The concerted acts of the three defendants had inflicted on the supermarket special damage not merely in degree but also different in kind in the exercise or enjoyment of its rights and convenience. Such special damage is over and above that suffered by members of the public generally as users of the road and customers of the supermarket. In the circumstances, the supermarket has succeeded in proving public nuisance on a balance of probabilities against all the three defendants. The learned trial judge has arrived at a correct finding on this issue.

BREACH OF STATUTORY DUTY

[76] In order to attach liability to a defendant such as DBKL for breach of statutory duty, the supermarket as plaintiff has to establish that:

a the injury the plaintiff has suffered is within the ambit of the statute;

b the statutory duty imposes on the defendant a liability to civil action;

c the statutory duty was not fulfilled by the defandant; and

d the breach of duty has caused injury to the plaintiff (see the judgment of Lim Beng Choon J (as he then was) at p 442G: rt in *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440 (HC)).

[77] His Lordship also explained that:

i A statute may impose a duty towards persons generally, in which case no question can arise of whether the plaintiff is within the class protected;

ii Where a statute confers powers coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie: *Schacht v The Queen in Right of the Province of Ontario* (1972) 30 DLR (3d) 641

iii Where the loss is occasioned by failure to exercise a power coupled with a discretion, there is no liability: *Great Central Railway Co v Hewlett* [1916] 2 AC 511;

iv A plaintiff is entitled to compensation if he can prove that there had been malicious refusal to exercise a discretionary statutory power: *David v Abdul Cader* [1963] WLR 834; and

v If a statute creates a duty but imposes no remedy, civil or criminal, for its breach, there is a presumption that a person injured thereby will have the right of action, for otherwise 'the statute would be but pious aspiration' (see the judgment of Lord Simons at p 407 in *Cutler v Wandsworth Stadium Ltd* [1949] AC 398).

[78] DBKL sought to disclaim liability on the ground that the supermarket had failed to prove any breach of statutory duty by DBKL.

[79] It was submitted for the supermarket that DBKL had, inter alia:

1 failed to maintain the road as a public street, in contravention of s 12 of the Street, Drainage and Building Act 1974 ('s 12'); and

2 failed to remove the obstruction, and instead allowed the road to be barricaded, contrary to s 46 of the of the same Act ('s 46').

[80] Having regard to the above facts, I shall now examine the specific elements in order to ascertain whether the supermarket has established this tort against DBKL.

[81] Section 12(1) provides for the declaration of a public street of which the road is one. Being a public street, the road shall 'forever afterwards be maintained by the local authority' such as DBKL in this case.

[82] Where relevant, s 46(1)(a) creates the offence of obstruction in the following words:

> 46. Obstruction Any person who builds, erects, sets up ……or permits to be built …other obstruction, in any public place, shall be guilty of causing an obstruction…….

[83] Under s 46(3)(a), a local authority such as DBKL 'may cause any such obstruction to be removed or may itself through its servants remove the same to a suitable place.'

[84] In my view, DBKL's failure to maintain the road as a public street is clearly demonstrated by DBKL's barricade to the road and allowing UDA to erect the 76 stalls thereon. The result of the barricade is the obstruction caused by DBKL to the road.

[85] The powers conferred on DBKL by s 46(3)(a) to remove the obstruction or cause it to be removed are in my view coupled with a duty to effect the removal thereof. DBKL's omission to do so constitutes a breach of statutory duty. Failure to maintain the road as a public street under s 12 is another illustration of such breach by DBKL, against which a remedy will lie: *Schacht*. The injury the supermarket has suffered ie the eventual collapse of its business, is consequent upon DBKL's breaches of the statutory duties expressed in ss 12 and 46.

[86] Although ss 12 and 46 do not expressly impose a civil remedy for such breaches, there is a presumption that the supermarket as the party injured thereby will have the right of action: see *Cutler*, per Lord Simons.

[87] DBKL's omission to perform its duty to maintain the road as a public street under s 12(1) and its failure to exercise the powers under s 46(3)(a) to remove the obstruction are obvious manifestations of DBKL's non-fulfilment of its statutory duties.

[88] There can be no doubt that DBKL's breaches of statutory duties under s 12 and s 46 have caused injury to the plaintiff as reflected in the eventual collapse of the business of the supermarket.

[89] In the circumstances, I hold that the supermarket has successfully established breaches of statutory duties occasioned by DBKL.

DEFENCE

[90] In essence, the common defence of the three defendants gravitates towards the exercise of statutory powers pertaining to the issuance of the TOL by the land administrator as an officer of the Government of Malaysia.

[91] The learned trial judge had acknowledged that the land administrator has the authority to issue the TOL under ss 65 and 66 read with s 42(2) of the NLC, but has rejected it as a defence.

[92] It is clear to me that the TOL was issued in respect of a public road heavily used by members of the public and the occupiers of the buildings along the road. The TOL could not override or interfere with their daily right or enjoyment in the use of the road. It cannot simply disregard the hardship caused to users of the road generally and the supermarket specially.

[93] In the exercise of the land administrator's powers in the issuance of the TOL to enable DBKL to barricade the road and to facilitate the erection of the 76 stalls by UDA, DBKL and the land administrator as an officer of the Government of Malaysia had effectively disregarded the rights of the users of the road generally and the supermarket specially. The TOL does not and could not clothe the three defendants with a carte blanche, licence or defence to cause, create or bring about public nuisance or breaches of statutory duties.

[94] Support for my view may be garnered from two weighty authorities, viz

1 *Syarikat Perniagaan United Aces Sdn Bhd & ORS v Majlis Perbandaran Petaling Jaya* [1997] 1 MLJ. 394 (FC), where the municipal council (MPPJ) had relocated a group of night market hawkers to a new trading site along Jalan SS21/60 ('this road'). Consequently, this road was temporarily closed between 5pm and 7am. The hawkers' filth was unbearable and public health was at stake. Five of the tenants/occupiers of this road filed an application for certiorari to quash MPPJ's decision to close this road. The application was dismissed with costs by the High Court. The Federal Court through the judgment of Wan Yahya FCJ (as he then was) allowed the appeal and held inter alia that the temporary closure was clearly ultra vires s.65 of the Local Government Act 1976, although that section provides that a local authority may temporarily close any public place vested in or under its control.

The Federal Court made it clear that the exercise of a statutory power to close any public road under eg s 65 does not provide a defence if the result was the creation of obstruction, health hazard or a situation detrimental to the residents of the premises along this road.

2 *Vasiliou v Secretary of State for Transport and Another* [1991] 2 All ER 77, where the (UK) Town and Country Planning Act 1971 s.209, as amended, empowers the Secretary of State to make an order to authorize the stopping up or diversion of any highway for development to be carried out. In considering s209, the English Court of Appeal, speaking through Nicholls LJ, held that the exercise of the powers to stop up or divert any highway for development does not mean that the Secretary of State could disregard the adverse effect on the trade of an owner of a business being done on the land adjoining the highway and the financial loss resulting as a direct consequence of that loss of trade.

[95] I am aware that the above two weighty judgments were handed down in relation to judicial review in administrative law. However, the principles enunciated therein are nevertheless applicable to the domain of public nuisance and breaches of statutory duties under consideration in the appeal herein.

[96] I therefore hold that the learned trial judge was right in rejecting the defendants' defence based on issuance of the TOL.

COLLAPSE OF BUSINESS

[97] All the three defendants submitted in substantially similar vein that the learned trial judge had erroneously concluded that the collapse of the supermarket's business was entirely due to the closure of the affected portion of the road and the erection of the 76 stalls on it, adding that there were other causes such as economic recession, stiff and unfair competition from hypermarkets, increased operating costs of the supermarket's branches in Kulim and Kangar and the unsatisfactory customer service rendered by the supermarket's members of the staff.

[98] The supermarket supported the learned trial judge's conclusion that the collapse of the supermarket's business was entirely and directly due to the closure of the affected portion of the road and the erection of the 76 stalls thereon

[99] In my judgment, the supermarket's business depended wholly and exclusively on the customers who were used to parking their cars at the parking bays on the road for the purpose of loading and unloading foodstuff and household goods purchased from the supermarket. The closure of the affected portion of the road and the erection of the 76 stalls had put a halt to the flow of traffic and customers to the supermarket. The lifeline of the supermarket's business appeared to have been disconnected, not for two years as originally contemplated by the defendants, but for the inordinate period of five years. The tremendous adverse effect on the supermarket's business is plain and obvious.

[100] While it may be true that economic recession or financial crisis in the nineties had brought about the collapse of untold business ventures, it is significant to observe that the essential foodstuff and household goods sold in the supermarket were not luxury items. They were sold at both economical and competitive prices by the supermarket. They constituted the daily and recurrent needs of 3500 customers drawn from its members consisting of some 6,000 individuals and 50 co-operative societies. The supermarket has established that it was largely recession-proof during the economic crisis in 1985 when the road was a thoroughfare.

[101] The emergence of several wholesale markets and hypermarkets were reflected in the supermarket's annual reports which expressly stated that they were not considered as competitors. The sales and profits of the supermarket remained substantially consistent, due to the convenience which the supermarket's customers enjoyed prior to the closure of the affected portion of the road.

[102] Apparently, alternative parking bays available at the hotel car park on the upper floor in the same building as the supermarket did not appear to be attractive to the supermarket's customers. The customers had not only to pay for the use of parking bays, but were also deprived of the convenience and ability to load and unload the purchased items at the direct entrance to the supermarket.

[103] I am of the view that the learned trial judge had not erred in concluding that the three defendants' concerted acts have entirely and directly caused the collapse of the supermarket's business.

PURE ECONOMIC LOSS

[104] It was contended that DBKL's liability for the supermarket's claim for pure economic loss based on the tort of public nuisance is excluded by the judgment of the Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 6 MLJ 389 (FC) ('MPAJ').

[105] In response, it was argued for the supermarket that its claim against DBKL was grounded not merely on public nuisance, but also breaches of statutory duties.

[106] I note that the causes of action in *MPAJ*, were founded on negligence and nuisance. The relevant question for determination by the Federal Court was whether it was fair, just and reasonable to impose a liability on a local authority such as MPAJ for pure economic loss to the plaintiff for MPAJ's failure to come up with and implement the promised drainage master plan etc to ensure that no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 and 3 of the Highland Towers in the Mukim of Hulu Klang within the local authority area of MPAJ. The answer was given in the majority judgment delivered by Abdul Hamid Mohamad FCJ (Arifin Zakaria FCJ concurring). In para 86, it was held that Malaysian courts will have to consider the effects of s 3 of the Civil Law Act 1956.

A After considering 'public policy' and 'local circumstances', his Lordship held that it was not fair, just and reasonable to impose such a burden on MPAJ or other local authorities in this country in similar situations arising from negligence and nuisance (paras 82 and 84).

B **[107]** It appears plain to me that the ratio expounded in the majority judgment of the Federal Court excluded MPAJ or other local authority from liability in any claim by a plaintiff for pure economic loss arising from negligence and nuisance. The Federal Court was not asked to determine and has therefore not decided on the issue of whether MPAJ or other local authority such as DBKL is insulated or immunized against liability for pure economic loss arising from breaches of statutory C duties.

[108] In my view, DBKL may rely on the majority judgment of the Federal Court to exclude liability from the supermarket's claim for pure economic loss based on negligence and nuisance only. With the utmost respect, the majority judgment does D not provide DBKL with an insulation or immunization against its liability arising from breaches of statutory duties.

DAMAGES

E **[109]** The three defendants contended that in awarding the sum of RM23,743,157 ('the sum') to the supermarket as damages, the learned trial judge had overlooked the apportionment of liability between the defendants, mitigation of damages, overlapping claims, capital expenditure and other factors that caused the collapse of the supermarket's business.

F **[110]** The supermarket responded that the claim for damages was supported by figures from audited accounts in relation to the actual loss caused by the obstruction and damages to restore the goodwill and business of the supermarket to the same position before the disruption.

G **[111]** In awarding the sum, the learned trial judge accepted the evidence of several witnesses, including PW4, an actuary.

[112] I would first set out the general object of awarding damages contained in *Clerk & Lindsell on Torts* (16th Ed), at p 254 paragraph 5-04:

H

> The general object of an award of damages is to compensate the plaintiff for the losses, pecuniary and non-pecuniary, sustained as a result of the defendant's tort. More specifically, the assessment process is said to aim at *restitutio in integrum*. The general principle is, in the oft-quoted words of Lord Blackburn, that the court should award 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he I would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.' The principle admits of application to losses which are capable of reasonable precise calculation in money terms.

[113] The question is whether the sum awarded by the learned trial judge is consistent with the above general object and principle.

[114] The actuary's evidence reveals that the closure of the affected portion of the road on 28 October 1996 had caused the total sales of the supermarket to drastically fall by some RM3,000,000 ie from RM21,128,835.81 at the end of September 1996 to RM17,225,099.20 at the end of September 1997. The supermarket's business suffered a loss of RM693,281for the accounting year ending September 1997.

[115] The supermarket's computer print-out dated 13 October 1997 shows that per day the number of supermarket's customers who made purchases fell from 3,500 to 2,551.

Year	Sales	Profit/Loss
	RM	RM
1996	21,128,835.81	377,374.05
1997	17,225,099.20	(693,281.00)
1998	14,273,874.71	(686,614.00)
1999	10,507,246.65	(351,577.00)
2000	6,909.886.12	(2,165,858.00
2001	1,554,029.16	(1,658,492.00)
2002	55,651.87	(994,448.00)
2003	3,900.00	(618,296.00)

[116] By the time the road was reopened in November 2001, the supermarket had lost all its customers. For the years 2002 and 2003, the suppliers refused to give credit to the supermarket and the supermarket had no cash to pay for supplies.

[117] Prior to the closure of the affected portion of the road, the supermarket enjoyed the average profit of RM382,228.90 which is derived from the profits computed over the previous six years before September 1996 amounting to RM2,293,373.41 as shown in the chart below:

1991	RM 694,513.00
1992	RM 349,558.81
1993	RM 334,706.16
1994	RM 583,928.65
1995	RM (46,707.21)
1996	RM 377,374.00
TOTAL	RM2,293.373.41

[118] Total profits for six years from 1991 to 1996 is RM2,293.373.41

[119] Divided by 6 years = RM382,228.90 (the average). Effectively, the supermarket incurred a total loss of RM9,844,157.00 in seven years commencing 28 October 1996 as shown in the following computations:

YEAR ENDING SEPTEMBER (RM)	ANNUAL LOSS PER YEAR (RM)	TOTAL LOSS PER YEAR (RM)
(a) 1997: there was a Loss instead of profit	(693,281.00)	
The profit which should have been made using the average Profit ought to be added to The loss suffered RM382,228 + (RM693,281)		1,075,504.00
(b) 1998	(686,614.00)	
RM382,228 + (RM686,614)		1,068,842.00
(c) 1999	351,577.00	
RM382,228 + (RM351,577)		733,805.00
(d) 2000	2,165,858.00	
RM382,228 + (RM2,165,858)		2,548,086.00
(e) 2001	1,658,492.00	
RM382,228 + (RM1,658,492)		2,040,720.00
(f) 2002	994,448.00	
RM382,228 + (RM994,448)		1,376,676.00
(g) 2003	618,296.00	
RM382,228 + (RM618,296)		1,000,524.00
Total loss from November 1996 till September 2003		RM9,844,157.00

[120] The closure of the affected portion of the road and the erection of the 76 stalls in the middle thereof had forced the supermarket to sell its premises in a prime location below the market value. The supermarket negotiated with the buyer of the property to lease the property to the supermarket for a fixed period of five years, with an option to renew for a further period of five years. The supermarket had to resort to these measures because it needed the proceeds of sale to maintain the supermarket and to pay numerous creditors.

[121] In relation to the sale of the premises below market value, the valuer (PW6) testified from his experience that most buyers of property would want vacant possession and if the plaintiff sells the property and at the same time wants to occupy

the property, there is the possibility of a negotiation to have lower selling price than the market price, depending on the circumstances of the case. He explained that between July 2002 and December 2003, properties of this nature would not have deteriorated in value.

[122] The supermarket had been carrying on its business at the location for more than 20 years and had its customer base living or working in areas around that location which was important for a retail outlet. Hence, the supermarket had to choose a buyer who would lease the property back to the supermarket. So on 1 December 2003, the supermarket was forced to sell the premises at a price lower than the market value. The supermarket suffered a loss of RM1,078,000, being the difference between the market value of RM7,078,000 and the actual sale price of RM6,000,000.

[123] After selling the property, the supermarket had to pay a monthly rent to carry on its business on the same premises, which expenditure the supermarket did not incur before the closure of the affected portion of the road.

[124] From 1 December 2003, the supermarket had to pay RM60,676 per month for five years with an option to renew for five years at the market value prevailing on the renewal. The supermarket had by a registered lease agreement contracted to pay the rent of RM60,676 for 60 months (five years) amounting to a total sum of RM3,640,560.

[125] Being a cooperative society, the supermarket was a body corporate with perpetual succession. It had expected to carry on its business permanently. Prior to the closure of the affected portion of the road, the supermarket had never anticipated discontinuance of its business at any time. The supermarket therefore obtained the option to renew the lease and committed itself to pay a further sum of RM39,500 during the option period for five more years (RM39,500 x 60 months) amounting to RM2,370,000.

[126] In addition, the supermarket suffered a loss of goodwill or the capital value of its business which the actuary estimated at RM1,811,000, after considering the audited accounts of the supermarket.

[127] The actuary testified that there was no overlapping between the claim for loss of profit and claim for loss in capital value as of 30 September 2004, and there was no claim for previous years as in the case of loss of profit. He added that there was no overlapping between the loss in the sale of the premises and the claim for rent.

[128] The actuary explained that the supermarket's claim for RM5,000,000 under the heading 'loss of business in any event' represents an essential claim for expenses to regain the business, and does not overlap the claim for loss of capital value. In addition, the supermarket will have to take time to re-build its business. It has to incur advertisement and promotion expenses, and holding costs, while waiting for customers to develop. It has to stay in business. Shelves have to be filled.

Perishable foodstuff has to be stocked and when it is no longer fresh, it has to be replaced. Varieties of stocks have to be made available for the customers. Stocks have to be replaced if they cannot be sold by the expiry date.

[129] Low purchase prices of supplies cannot be expected until the supermarket begins to buy in bulk.

[130] All such expenses to rebuild the supermarket's clientele and to rebuild its volume of business, at RM20,000,000 to RM21,000,000 over the six years prior to the closure of the affected portion of the road is conservatively estimated at RM5,000,000. In proportion to the volume of business at RM20,0000 and RM21,000,000 prior to the closure of the affected portion of the road, the sum of RM5,000,000 is between 23.8% and 25% of one year's sales. Considering that the supermarket took 20 years to build up these sales, the supermarket is expected to take sometime to build up its former business, if at all it can.

[131] The supermarket's total claim for the sum is specifically set out as follows:

Total loss from November 1996 till September 2003	RM 9,844,157
Diff. between market value of premises & sale price	RM 1,078,000
After sale of premises, to rent the premises at monthly rent – RM60,676 x 60	RM 3,640,560
Rental payable on option to renew tenancy Monthly rent RM39,500 x 60	RM 2,370,000
Loss of goodwill or Capital value	RM 1,811,000
Loss of business in any event ie cost to recover lost business	RM 5,000,000
TOTAL LOSS	RM23,743,157

[132] The learned trial judge has accepted the evidence of the relevant witnesses for the plaintiff. These witnesses including the actuary have been bombarded by way of incisive cross- examination. The learned trial judge has found that the evidence of the actuary in particular and that of the other witnesses who testified for the plaintiff in general have emerged unscathed. I am unable to find any error in the award of the damages by the learned trial judge. There is no justification for appellate interference, except to observe that since UDA, DBKL and the Government of Malaysia were joint tortfeasors, in public nuisance and additionally, DBKL for breaches of statutory duties, their liability should be apportioned equally.

[133] My learned brothers James Foong and Suriyadi JJCA have read this judgment in draft. We are of the unanimous opinion that the decision of the court below should be upheld in respect of liability. Suriyadi JCA also concurred with me in affirming the damages awarded by the learned trial judge.

CONCLUSION

[134] On the foregoing grounds, the appeals against liability are unanimously dismissed, while the appeals against quantum are dismissed by way of a majority

judgment. The learned trial judge's orders on liability and quantum are likewise affirmed. UDA, DBKL and the Government of Malaysia are ordered to bear the damages equally. Costs of these appeals to be paid by the three defendants to the supermarket. Deposits to the supermarket on account of taxed costs.

Appeal dismissed.

Reported by Loo Lai Mee